Pretrial Proceedings

Chapter 9

Summary of Contents

9.1 Pretrial Conferences

MCR 5.922(D) allows the court to direct the parties to appear at a pretrial conference to settle all pretrial matters. Except as otherwise provided in or unless inconsistent with the rules of Subchapter 5.900, the scope and effect of a pretrial conference are governed by MCR 2.401.

A pretrial conference may be held at any time after the commencement of the action. The court must give reasonable notice of the scheduling of the conference. MCR 2.401(A).

9.2 Appointment of Attorney for the Child*

*See Section 7.12.

*See Section 7.11 for discussion of the lawyer-guardian ad litem's determination of the child's best interests.

The court must appoint a lawyer-guardian ad litem for each child. The lawyer-guardian ad litem must interview the child (if the child is old enough to be interviewed) to determine the child's wishes.* If the lawyer-guardian ad litem then determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem must communicate the child's position to the court. If the court considers appointment of an attorney appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney. The attorney, if appointed, serves in addition to the child's lawyer-guardian ad litem. MCL 712A.17d(2); MSA 27.3178(598.17d)(2).

9.3 Discovery*

*See also Sections 2.17–2.20 (access to records during investigation of alleged abuse or neglect), 5.13 (subpoenas), 9.10, below (court-ordered examination of parent and child), and 12.18 (court's authority to order production of additional evidence during trial).

A. As of Right

MCR 5.922(A)(1)(a)–(g) lists the following materials as discoverable as of right if they are requested no later than 21 days before trial:

(a) all written or recorded statements and notes of statements made by the child or respondent, in the possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

(b) all written or recorded non-confidential statements made by any person with knowledge of the events, in possession or control of petitioner or a law enforcement agency, including police reports;

(c) the names of prospective witnesses;

(d) a list of all physical or tangible objects which are prospective evidence;

(e) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are prospective evidence in the matter;

(f) the results of any lineups or showups, including written reports or lineup sheets; and

(g) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.

B. By Motion

MCR 5.922(A)(2) states that on motion* of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under MCR 5.922(A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery. *Id.*

*See Section 9.4, below (motion practice).

The Court of Appeals has held that the trial court may not allow the attorney for the respondent-parent to interview or depose the child under this rule. *In re Lemmer*, 191 Mich App 253 (1991). The Court construed the term "other materials" in the court rule to include only tangible items or items within the knowledge of the petitioner similar to those items that are discoverable by right listed in MCR 5.922(A)(1). *Id.*, at 256. Note, however, that MCR 5.922(A)(2) has been amended subsequent to the decision in *Lemmer* to allow discovery of "other materials *and evidence"* upon motion of a party (emphasis added).

Amendments to MCR 2.305, MCR 2.310, and MCR 2.506, effective December 1, 1998, allow a party in child protective proceedings to subpoena a nonparty's records as a form of discovery. See MCR 2.305(A)(3) (deposition notice and subpoena may provide that deposition is solely for the purpose of producing documents for inspection and copying, not for actual deposition), MCR 2.310(B)(2) (party may serve on a nonparty a request to inspect tangible things), and MCR 2.506(A)(3) (subpoena may be issued in accordance with MCR 2.305). It is possible, therefore, in a child protective proceeding, to inspect the records of a mental health professional, medical doctor, school official, or similar persons under these court rules.

A lawyer-guardian ad litem's case file is not discoverable. MCL 712A.17d(3); MSA 27.3178(598.17d)(3).

9.4 Motion Practice

Motion practice in protective proceedings is governed by MCR 2.119, except that a motion to suppress evidence must be filed at least seven days before trial or, in the court's discretion, at trial. MCR 5.922(C).

A. Referees Who May Conduct Pretrial Motion Hearings

The court may assign a referee who is licensed to practice law in Michigan to conduct a pretrial motion hearing. MCL 712A.10(1); MSA 27.3178(598.10)(1), and MCR 5.913(A)(1) and MCR 5.913(A)(3).

B. Notice and Service Requirements

Personal service of the motion, notice of the hearing on the motion, and any supporting briefs or affidavits must be made at least seven days before the hearing, nine days if served by mail. Personal service of the response must be made at least three days before the hearing. If service is by mail, add two days. For good cause, the court may set different periods for filing and serving motions. MCR 2.119(C).

C. Form of Motions

Unless made during trial, a motion must be in writing, must state with particularity the grounds and authority on which it is based, must state the relief or order sought, and must be signed by the party or attorney filing the motion. MCR 2.119(A). A court may, in its discretion, dispense with or limit oral argument and may require the parties to file briefs in support of and in opposition to a motion. MCR 2.119(E)(3).

Affidavits may be required when a motion is based on facts not appearing in the record. MCR 2.119(E)(2). If an affidavit is filed, it must be based on personal knowledge, state with particularity facts admissible as evidence, and demonstrate that the affiant is competent to testify as a witness. MCR 2.119(B)(1).

D. Motions for Rehearing and Reconsideration*

*See also Chapter 15 for a discussion of motions for rehearing pursuant to MCR 5.992.

A motion for rehearing or reconsideration must be filed and served within 14 days of the entry of the order disposing of the motion. MCR 2.119(F)(1). No response to the motion may be filed, and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The moving party must demonstrate palpable error and show that a different disposition must result from correction of the error. MCR 2.119(F)(3).

9.5 Motions to Close Proceedings to the Public*

*See also Section 22.6 for a discussion of film or electronic media coverage of court proceedings.

MCR 5.925(A)(1) provides that, as a general rule, all proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7); MSA 27.3178(598.17)(7), and MCR 5.925(A)(2) allow the court to close protective proceedings to the general public under limited circumstances. The court, on motion of a party or a victim, may close proceedings to the general public during the testimony of a child witness or a victim to protect the welfare of the child witness or victim. In making such a decision, the court must consider:

- the age of the child witness or the victim;
- the nature of the proceedings; and
- the desire of the child witness or his or her family or guardian or the desire of the victim to have the testimony taken in a room closed to the public.

A petitioner, child, respondent-parent, or other parent or guardian may move to close the proceedings. See MCR 5.903(A)(13)(b) (definition of "party"). A "parent" means a person who is legally responsible for the control and care of the child, including a mother, father, guardian, or custodian, other than a custodian of a state facility, a guardian ad litem, or a court-ordered custodian. MCR 5.903(A)(12).

When a court has ordered, or has pending before it a request to order, a limitation on the access of the public to court proceedings or records of those proceedings that are otherwise public, any person may file a motion to set aside the order or an objection to entry of the proposed order. If the court denies a motion to set aside the order or enters an order after objection is filed, the moving or objecting party may file an application for leave to appeal in the same manner as a party to the action. MCR 8.116(D).

9.6 Motions for Change of Venue

Venue is proper in protective proceedings in the county where the child is found. MCL 712A.2(b); MSA 27.3178(598.2)(b). A child is "found within the county" where the offense against the child occurred or where the child is physically present. An "offense against a child" may be an act or omission. MCR 5.903(C)(5).

On motion of a party, the court may order a change of venue:

(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or

(2) when an impartial trial cannot be had where the case is pending.

MCR 5.926(D)(1)–(2).

All costs of the proceeding in another county must be borne by the court ordering the change of venue. MCR 5.926(D).

9.7 Required Hearings on the Admissibility of Statements by Children Under Age 10 Describing Acts of Abuse

A statement by a child under 10 years of age describing an act of child abuse as defined in MCL 722.622(c); MSA 25.248(2)(c), of the Child Protection Law, performed with or on the child, not otherwise admissible under an exception to the hearsay rule, may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature and circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act. MCR 5.972(C)(2).*

*See Section 11.7 for a detailed discussion of this rule.

9.8 Alternative Procedures to Obtain Testimony of Child Witnesses

MCR 5.923(E) states that the court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, and support persons, and may take other measures to protect the child witness as authorized by, and enumerated in, MCL 712A.17b; MSA 27.3178(598.17b). See MCL 712A.17b(2)(b); MSA 27.3178(598.17b)(2)(b) (statute applies to protective proceedings).

MCL 712A.17b(14); MSA 27.3178(598.17b)(14), states that the procedures in the statute are in addition to other protections or procedures afforded to a witness by law or court rule. MRE 611(a) allows the court to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. See, generally, *In re Hensley*, 220 Mich App 331, 332–35 (1996).

A. Witnesses Covered by the Statute

MCL 712A.17b(1)(b) and (2)(b); MSA 27.3178(598.17b)(1)(b) and (2)(b), define "witness" in child protective proceedings as an alleged victim of an offense who is either:

- under 16 years of age, or
- older than 16 years of age and developmentally disabled.

MCL 712A.17b(1)(a); MSA 27.3178(598.17b)(1)(a), in turn, provides that "developmental disability" is to be defined as in MCL 330.1100a(20)(a)–(b); MSA 14.800(100a)(20)(a)–(b), except that for purposes of MCL 712A.17b; MSA 27.3178(598.17b), "developmental disability" includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 712A.17b(1)(a); MSA 27.3178(598.17b)(1)(a).

If applied to an individual older than five years of age, "developmental disability" means a severe, chronic condition that meets all of the following conditions:

- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;

- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care;
  - receptive and expressive language;
  - learning;
  - mobility;
  - self-direction;
  - capacity for independent living;
  - economic self-sufficiency; and
- reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

MCL 330.1100a(20)(a)(ii)–(v); MSA 14.800(100a)(20)(a)(ii)–(v).

If applied to a minor from birth to age five, "developmental disability" means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined above if services are not provided. MCL 330.1100a(20)(b); MSA 14.800(100a)(20)(b).

B. Methods That May Be Used

Dolls or Mannequins

If pertinent, the witness must be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. MCL 712A.17b(3); MSA 27.3178(598.17b)(3).

Support Person

MCL 712A.17b(4); MSA 27.3178(598.17b)(4), provides that a witness who is called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person must name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person must be filed with the court and served upon all parties to the proceeding. The court shall rule on any motion objecting to the use of a named support person prior to the date at which the witness desires to use the support person.

F Videotape Deposition of Witness

If, upon motion of any party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court may order that a videotape deposition be taken, which must be admitted into evidence at the trial instead of the live testimony of the witness. The examination and cross-examination of the witness in the deposition must proceed in the same manner as permitted at trial. MCL 712A.17b(9); MSA 27.3178(598.17b)(9).

*See Section 9.9, below, for the court's authority to order use of an impartial questioner.

In *In re Brock*, 442 Mich 101, 105–15 (1993), the Court addressed a due process challenge to the use of alternative procedures to obtain the testimony of a child witness. After expert testimony on the issue, the trial court found that the three-year-old child would suffer psychological harm were she to testify in the courtroom, with or without the respondent-parents present. The trial court ordered a videotaped deposition conducted by an impartial questioner.* The respondent-parents were not allowed face-to-face confrontation or cross-examination of the child, but the impartial questioner did ask questions that the parents had submitted. The Michigan Supreme Court held that procedural due process requirements were satisfied in this case. *Id.*, at 107. There was little risk of erroneous deprivation of the parents' protected right to the management of their children because a child may still be returned to a parent after the court has assumed jurisdiction, and termination of parental rights may be ordered only on presentation of clear and convincing evidence. *Id.*, at 111–12. Also, confrontation and cross-examination would be of little value to the truth-seeking function of a trial if the child was found to be traumatized by the procedures. *Id.*, at 112. The state has a significant interest in the protection of children. *Id.*, at 112–13.

The court must hear evidence and make particularized, case-specific findings that the proposed alternative procedure is necessary to protect the welfare of the child witness who seeks to testify. See *Maryland v Craig*, 497 US 836, 855–56; 110 S Ct 3157; 111 L Ed 2d 666 (1990), and *Brock*, *supra*, at 110.

F Shielding Witness From Respondent

If, upon motion of any party or in the court's discretion, the court finds that psychological harm to the witness would occur if the witness were to testify at a proceeding in the presence of respondent or in a videotape deposition, the court may order that, during his or her testimony, the witness must be shielded from viewing the respondent in such a manner as to enable the respondent to consult with his or her attorney and to see and hear the testimony of the witness without the witness being able to see the respondent. MCL 712A.17b(8); MSA 27.3178(598.17b)(8).

9.9 Appointment of Impartial Questioner

The court may appoint an impartial psychologist or psychiatrist to ask questions of a child witness at a hearing. MCR 5.923(F).

9.10 Orders for Examination or Evaluation of Parent or Child

The court may order that a minor or parent be examined or evaluated by a physician, dentist, psychologist, or psychiatrist. MCR 5.923(B). See also MCL 712A.12; MSA 27.3178(598.12) (after petition has been filed, court may order further investigation, including examination by physician, dentist, psychologist, or psychiatrist).

The privilege against self-incrimination in the Fifth Amendment to the United States Constitution may not be raised by a parent to prevent him or her from undergoing a psychological examination in child protective proceedings to determine if parental rights should be terminated. *In re Johnson*, 142 Mich App 764, 765–66 (1985).

Persons or agencies providing testimony, reports, or other relevant and material information at the court's request following authorization of a petition are immune from any subsequent legal action with respect to furnishing the information to the court. MCR 5.924.

9.11 Demand for Jury Trial or Trial by Judge

The right to a jury exists only at trial. MCR 5.911(A), *In the Matter of Rebecca Oakes*, 53 Mich App 629, 631–32 (1974), and *In re Mathers*, 371 Mich 516, 531 (1963).

MCR 5.911(B) provides that a party may demand a jury trial by filing a written demand with the court. The demand must be filed within 14 days after the court gives notice of the right to a jury trial or 14 days after the appearance of counsel, whichever is later.* The demand must be filed no later than seven days before trial, but the court may excuse a late filing in the interest of justice. MCL 712A.17(2); MSA 27.3178(598.17)(2), provides that any person interested in the hearing may demand a jury, or the court, on its own motion, may order a jury to try the case.

*See Sections 7.15(B) and (E).

Similarly, MCR 5.912(B) states that a party may demand that a judge rather than a referee serve as factfinder at a nonjury trial by filing a written demand with the court. The demand must be filed within 14 days after the court has given the parties notice of their right to have a judge preside, or 14 days after the appearance of counsel, whichever is later. The demand must be made no later than seven days before trial, but the court may excuse a late filing in the interest of justice.

A judge must preside at a jury trial. MCR 5.912(A)(1)(a). Disqualification of a judge is governed by MCR 2.003. MCR 5.912(C). See *In re Schmeltzer*, 175 Mich App 666, 673–74 (1989) (disqualification of trial judge was not warranted, where the judge had presided over termination proceedings involving a younger sibling; evidence of the prior abuse or neglect was admissible at the subsequent trial).*

*See Section 11.8 (evidence of the treatment of one child is relevant to treatment of another child).

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. MCR 5.913(B).

Only referees who are licensed to practice law in Michigan may conduct protective proceedings other than preliminary inquiries, preliminary hearings, and progress reviews. MCR 5.913(A)(3).

9.12 Required Procedures for Establishing Paternity*

*See also MCL 710.36, 710.37, and 710.39; MSA 27.3178 (555.36), 27.3178 (555.37), and 27.3178 (555.39) (required procedures under Adoption Code), and MCL 722.711 et seq.; MSA 25.491 et seq. (Paternity Act).

Note: To prevent later delays, putative fathers should be identified as early as possible in child protective proceedings. See Grasso, ed, *Final Report: Michigan Court Improvement Program Assessment of Probate Courts' Handling of Child Abuse and Neglect Cases*,(Washington, D.C.: American Bar Association, 1997) Recommendation 10, p 45. See also Form JC 04 (Petition), which contains a check box to identify the father as a putative father.

If, at any time during the pendency of a child protective proceeding, the court determines that the child has no father as defined in 9.12(A), below, the court may, in its discretion, take appropriate action as described in Sections 9.12(B) and (C), below. See MCR 5.921(D).

A. Definition of "Father"

For purposes of child protective proceedings, a "father" is a man:

- married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a "child born out of wedlock." MCR 5.903(A)(4)(a). A "child born out of wedlock" means a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage. MCR 5.903(A)(1) and *In re Montgomery*, 185 Mich App 341, 343 (1990);
- who legally adopts the minor. MCR 5.903(A)(4)(b);
- who was named on a Michigan birth certificate for a minor born after July 20, 1993, as provided by MCL 333.21532; MSA 14.15(21532). MCR 5.903(A)(4)(c); or

- whose paternity is established in one of the following ways within time limits,* when applicable, set by the court. MCR 5.903(A)(4)(d).

*See Section 9.12(C), below.

Paternity may be established by:

- the man and the mother filing an acknowledgment of paternity as required by MCR 5.903(A)(4)(d)(i);
- the man and the mother filing a joint written request for a correction of the certificate of birth pertaining to the minor that results in issuance of a substituted certificate recording the birth;
- the man completing and filing an acknowledgment of paternity, without the mother joining in the acknowledgment if she is disqualified from signing the acknowledgment by reason of mental incapacity, death, or any other reason satisfactory to the Family Division judge of the county of the mother's residence or, if the mother is not a resident of this state when the man signs the acknowledgment, of the county of the child's birth; or
- order of filiation or by judgment of paternity, whereby the man is determined judicially to be the father of the minor.

MCR 5.903(A)(4)(d)(i)–(iv).

B. Required Notice to Putative Father

The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court must direct that notice be served on that person pursuant to MCR 5.920. MCR 5.921(D)(1). See, generally, *In re Mayfield,* 198 Mich App 226 (1993).*

*See Section 5.1 for a general discussion of notice requirements in child protective proceedings.

The putative father must be personally served or served in some other manner that the court finds reasonably calculated to provide notice. If such notice is given, the court may proceed in the absence of the putative father. MCR 5.921(D)(2)(a).

The required notice* must include the following information:

*See Form JC 53, which includes this required notice.

(a) that a petition has been filed with the court;

(b) the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and

(c) a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.

MCR 5.921(D)(1)(a)–(c).

C. Required Procedures at Hearing to Establish That Putative Father Is the Natural Father of the Child

After notice to the putative father, the court may conduct a hearing to determine whether the putative father is the natural father of the child. MCR 5.921(D)(2).

*See Section 9.12(A), above.

The court may determine that a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 5.903(A)(4).* However, if the court decides that the interests of justice require, it is not necessary for the mother of the minor to join in an acknowledgment of paternity executed by the father. The court may extend the 14-day period for good cause shown. MCR 5.921(D)(2)(b).

If the court determines that there is probable cause to believe that another identifiable person is the natural father of the minor, the court must proceed in accordance with MCR 5.921(D). MCR 5.921(D)(2)(c).

If, after diligent inquiry, the identity of the natural father cannot be determined, the court may proceed without further notice or court-appointed attorney for the unidentified person. MCR 5.921(D)(2)(d).

The court may find that the natural father waives all right to further notice, including the right to notice of termination of parental rights and the right to legal counsel, if:

(a) he fails to appear after proper notice, or

(b) he appears, but fails to establish paternity within the time set by the court.

MCR 5.921(D)(3).